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CHIEF CLERK'S OFFICE

Regarding a Complaint and Petition by Commonwealth Edison Company For An Order Finding PDV Midwest LLC in Violation of the Prohibition on Resale of Retail Electric Service contained in the Illinois Public Utilities Act and set forth in Rider 12, Conditions of Resale or Redistribution of Electricity by the Customer to Third Persons, and for Other Relief.

Docket No. 02-0277

**COMED'S MOTION TO COMPEL
NEEDLE COKER AND CHICAGO CARBON TO
RESPOND TO ITS FIRST SET OF DATA REQUESTS**

Commonwealth Edison Company (“ComEd”), by its attorneys, and pursuant to § 200.350 of the Illinois Commerce Commission’s (the “Commission’s”) Rules of Practice, 83 Ill. Adm. Code § 200.350, respectfully moves the Administrative Law Judge to enter an order compelling the Needle Coker Company (“Needle Coker”) and the Chicago Carbon Company (“Chicago Carbon” and collectively, with Needle Coker, the “Respondents”) to fully respond to data requests 1.01, 1.02, 1.03, and 1.05 of ComEd’s First Set of Data Requests. In support of its Motion, ComEd states as follows:

FACTUAL BACKGROUND

1. This case involves electric service that ComEd provides to a large industrial facility in Lemont, Illinois (the “Facility”). Several entities have operations at the Facility, including the Respondents, PDV Midwest Refining, L.L.C. (“PDV Midwest”) and CITGO Petroleum Corporation (“CITGO”). PDV Midwest and CITGO are also parties to this case, but are not subject to this Motion. They are also represented by separate counsel.

2. From in or about August, 1997 to August, 2002, ComEd supplied electricity to the Facility pursuant to an Electric Service Contract that it had entered into with PDV Midwest in accordance with ComEd's Rate CS (the "Rate CS Contract" or the "Contract"). PDV Midwest was the only entity operating at the Facility that was a party to the Contract. Pursuant to the Contract, PDV Midwest purchased electricity a negotiated discount price under Rate CS.

3. ComEd initiated this action after it learned that Needle Coker and Chicago Carbon sued PDV Midwest and its affiliate CITGO in the Circuit Court of Cook County (the "Litigation") over the electric service provided to the Facility. Needle Coker and Chicago Carbon claimed in the Litigation that PDV Midwest and CITGO had engaged in a "three year fraudulent billing scheme involving millions of dollars and vast amounts of electricity." At the heart of this "scheme" is the allegation that PDV Midwest purchased electricity at discount prices from ComEd under the Rate CS Contract, and then "resold" the electricity to Needle Coker and Chicago Carbon at inflated prices set pursuant to ComEd's Rate 6L.

4. ComEd initiated this proceeding because the illegal resale "scheme" that was the basis of the Litigation violated, among other things, the Illinois Public Utilities Act, prior Commission Orders and the terms of ComEd's Rider 12. In its First Set of Data Requests, ComEd requested that Needle Coker and Chicago Carbon provide documents and information concerning the illegal resale "scheme" that they alleged had occurred. For example, ComEd requested documents concerning the resale transactions at issue and the Rate CS Contract. (Requests 1.01 and 1.03(a)). A copy of ComEd's First Set of Data Requests is attached hereto as Exhibit A.

5. Needle Coker and Chicago Carbon have refused to produce nearly all of the documents and information that ComEd requested. Their refusal to provide the requested documents and information is surprising because, as stated above, ComEd's First Set of Data Requests requested the production of materials relating to the allegations made in the Litigation. To date, the Respondents' production of materials has consisted primarily of the court file from the Litigation (which is publicly available) and a handful of transmittal letters between counsel in the Litigation. As discussed below, none of the underlying business documentation regarding the resale transactions has been produced by the Respondents.

6. The Respondents served written responses to ComEd's First Set of Data Requests on December 3, 2002, a copy of which is attached as Exhibit B. After that time, ComEd and the Respondents attempted to arrive at a Confidentiality Agreement that would apply to, among other things, documents that the Respondents claimed would be produced at their counsel's office. On January 3, 2003, ComEd's counsel sent a letter to the Respondents' counsel outlining the deficiencies in the Respondents' responses to ComEd's requests, a copy of which is attached as Exhibit C. Counsel subsequently exchanged letters on January 6 and 8, 2003, copies of which are attached as Exhibits D and E. Despite this exchange of correspondence, the parties have been unable to resolve their differences. ComEd now therefore moves to compel.

ARGUMENT

7. ComEd is entitled to the documents and information requested in its First Set of Data Requests. The documents and information that ComEd has requested all pertain to the illegal resale transactions that were the basis for the Respondents' allegations in the Litigation. There is no basis for the Respondents to refuse to provide the requested materials. Compelling the Respondents to produce these materials is consistent with the Commission's policy on discovery, as set forth in Section 200.340 of the Commission's Rules of Practice, which permits parties "to obtain full disclosure of all relevant and material facts to a proceeding." 83 Ill. Adm. Code § 200.340.

8. Also, ComEd has made reasonable attempts to resolve its disputes with the Respondents in accordance with the Commission's Rules of Practice. See 83 Ill. Adm. Code § 200.350. These efforts have not been successful. Moreover, ComEd will be prejudiced if it does not receive full and fair disclosure from Needle Coker and Chicago Carbon, as is set forth below.

**A. Respondents Must Fully and Fairly
Respond to ComEd's Data Request 1.01 and 1.02**

9. ComEd's data requests 1.01 and 1.02 requested the production of documents concerning the Rate CS Contract and documents that discuss, refer or relate to electric service provided to the Lemont Facility. (ComEd DR 1.02, Ex A at 4). In response to these requests, the Respondents produced the publicly available court file from the Litigation and several related transmittal letters, nearly all without attachments. The Respondents also indicated that they would make certain documents that discuss "payments" for electric service available for inspection at their counsel's office. (Ex. B at 3-4).

10. The Respondents have never produced documents at their counsel's office. After the Respondents' served their written responses to ComEd's data requests, discussions occurred concerning a Confidentiality Agreement that would apply this matter. ComEd, PDV Midwest and CITGO have been able to reach an agreement concerning this Confidentiality Agreement, but the Respondents have not. During the extended discussions concerning the Agreement, ComEd's counsel asked the Respondents to produce documents that would not be designated as confidential and that could be produced before the Confidentiality Agreement was finalized. Surprisingly, the Respondents' counsel indicated that none of the documents that were to be produced for inspection would be designated as confidential.

11. Because there is no dispute over confidentiality, the documents concerning "payments" for electric service provided to the Facility must be produced. These documents are responsive to ComEd's requests by the Respondents' own admission. They are not confidential and there is no legitimate reason why they are being withheld from ComEd.

12. Moreover, the Respondents' statement that they will produce only the documents regarding "payments" for electric service at the Facility is improper. Additional documents regarding the electric service provided to the Lemont Facility, especially service provided under the Rate CS Contract, are undoubtedly reasonably calculated to lead to the discovery of admissible. "Relevance for discovery purposes includes not only what is admissible at trial, but also that which leads to admissible evidence." Dufour v. Mobil Oil Corp., 301 Ill. App. 3d 156, 160, 703 N.E. 2d 448, 451 (1st Dist. 1998).

13. For example, transmittal letters that the Respondents have produced indicate that an "audit" of the electric costs relating the Facility was performed, which may have

been a precursor to the Litigation. (See documents 426 – 27, copies of which are attached as Exhibit F). Other than these transmittal letters, no materials concerning this audit have been produced. These audit materials are undoubtedly key documents concerning the resale transactions. These materials and other materials called for by ComEd's requests 1.01 and 1.02 are relevant to this case and must be produced by the Respondents.

**B. Respondents Must Fully and Fairly
Respond to ComEd's Data Request 1.03**

14. ComEd's Data Request 1.03 asked whether "PDV Midwest or CITGO [had resold] electricity provided under [ComEd's] Rate CS Contract" to Needle Coker and Chicago Carbon. (ComEd DR 1.03, Ex. A at 5). ComEd drafted DR 1.03 as a direct result of Respondents' allegations concerning resale in the Litigation. If Needle Coker and Chicago Carbon agreed that such a resale had occurred, as they undoubtedly must given their allegations in the Litigation, the request also asked for documents and information relating to the resale, such as:

- documents relating to the resale (sub-part a);
- the identity of individuals with knowledge concerning the resale (sub-part b);
- the dates when the resale of electricity occurred (sub-part c);
- the purchaser of electricity in connection with each resale (sub-part d);
- the amount of electricity sold and the price paid in connection with each resale (sub-parts e & f).

(Id.)

15. Even though this request sought information that was at the heart of the Litigation, the Respondents refused to respond. The Respondents provided none of the requested information concerning the background of the resale transactions they had uncovered that was

sought in subpart (b) through (f) of this request. They also only produced the publicly available court file and several transmittal letters (without the accompanying documents). Significantly, no business records concerning these resale transactions were made available.

16. The Respondents improperly objected to this request on the grounds that it was “overbroad.” Under Illinois law, information is relevant, material, and discoverable if it relates to the claims or defenses of any party. Ill. Sup. Ct. R. 201(b)(1); Computer Teaching Corp. v. Courseware Applications, Inc., 199 Ill. App. 3d 154, 157, 556 N.E. 2d 816, 818 (1990) (quoting Sup. Ct. R. 201(b)(1)); 83 Ill. Admin. Code § 200.340. ComEd’s request goes to the resale transactions that are at the heart of this case. There is nothing overbroad about the request.

17. The Respondents also incorrectly objected to this request claiming that it was unduly “burdensome.” This objection is also without merit, especially because the Respondents did not specify any particular burdens that accompanied the production of any of the requested documents or materials. In the absence of such information, their objection is incorrect. See, e.g., Schaap v. Executive Indus., Inc., 130 F.R.D. 384, 387 (N.D. Ill. 1990)(finding that when a party objects on the grounds that a discovery request is unduly burdensome, the objecting party must specify the nature of the burden and provide specific explanations as to why the request cannot be answered). Moreover, the requested materials are presently at issue in the Litigation, and therefore are presumably readily available.

18. Business records concerning the resale transactions undoubtedly exist, but have not been produced. In fact, the Respondents’ attached internal PDV documents concerning the resale transactions to the Complaint filed in the Litigation. Other internal PDV documents concerning these transaction must exist. Needle Coker and Chicago Carbon also presumably

created business records concerning the resale transactions when they were uncovered. The electric audit documents referred to above that have not been produced are presumably documents of this type. These documents should be produced.

**C. Respondents Must Fully and Fairly
Respond to ComEd's Data Request 1.05**

19. ComEd data request 1.05 seeks the production of documents that discuss or refer to the Litigation, including:

- any and all communications (including e-mail communications) or items of correspondence that discuss or refer or that relate to the Litigation;
- all documents produced by any party in connection with the Litigation; and
- all documents that discuss or refer or that relate to the settlement of the Litigation including, but not limited to documents that discuss or refer or that relate to negotiations concerning the settlement of the Litigation, including any draft settlement agreements.

(ComEd DR 1.05, Ex. A at 6).

20. In response to this request, the Respondents produced, as stated above, only the publicly filed materials from the Litigation and several transmittal letters (without the enclosed documents). The Respondents have stated that no other responsive documents concerning the Litigation exist that are not subject to the attorney-client privilege. They also claim that documents concerning the proposed settlement of the Litigation are not relevant to this case.

21. The Respondents' response is improper. It is difficult to believe that all of the documents concerning the Litigation other than those produced are subject to the attorney-client privilege. Certainly there are internal documents concerning the Litigation that do not involve counsel that are therefore not subject to the privilege. Communications with outside

parties, such as any consultants who performed work in connection with the Litigation, would also not be subject to attorney client privilege. These documents therefore must be produced.

22. The Respondents have stated that no documents were produced in response to discovery requests made in the Litigation. However, the transmittal letters they produced show that this assertion is incorrect. These letters show that Seneca Petroleum, a third-party, produced documents in response to a subpoena in the Litigation. (See documents 434 – 437, copies attached as Exhibit G). These materials were not produced to ComEd. They should be provided, along with all other documents produced in connection with the Litigation.

23. Documents concerning the proposed settlement of the Litigation also must be produced. Contrary to the Respondents' contentions, these documents are relevant to this case because they are reasonably calculated to lead to the discovery of admissible evidence regarding the resale transactions involved in the Litigation. They are also relevant to the interest and bias of Needle Coker, Chicago Carbon and PDV witnesses, and should also be produced for this additional reason.

CONCLUSION

WHEREFORE, for all of the reasons that are set forth above, ComEd respectfully requests the entry of an Order compelling Needle Coker and Chicago Carbon to respond to ComEd data requests 1.01, 1.02, 1.03, and 1.05 of ComEd's First Set of Data Requests in a complete manner as required by the Commission's discovery rules and by the Rules of the Illinois Supreme Court.

Dated: January 9, 2003

Respectfully Submitted

Commonwealth Edison Company

By: Bryan S. Anderson / wca
One of the attorneys for
Commonwealth Edison Company

Paul F. Hanzlik
Bryan S. Anderson
FOLEY & LARDNER
321 North Clark Street
21st Floor
Chicago, Illinois 60610
(312) 832-4500 – phone
(312) 645-0141 – fax

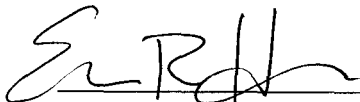
STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

VERIFICATION

Robert C. Feldmeier, being first duly sworn upon oath, states that he is one of the attorneys for Commonwealth Edison Company, an Illinois corporation; that he is authorized to make this affidavit; and that he has read the foregoing Commonwealth Edison Company's Motion to Compel Needle Coker's and Chicago Carbon's Response to ComEd's First Set of Data Requests, that he is familiar with the facts and matters set forth therein, and that the same are true to the best of his information and belief.


Robert C. Feldmeier

Subscribed and Sworn to
Before me this 9th day
of January, 2003.


Notary Public

My Commission Expires:

